U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 21, 2016

BY EMAIL

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)

Dear Judge Castel:

This letter objects to the statute of limitations instruction proposed by defendant Gary Hirst and instead proposes language consistent with limitations charges given in recent securities fraud prosecutions in the Southern District of New York.

The Government respectfully requests that the Court include a statute of limitations paragraph in the section of the charge addressing the concept of variance in dates from the Indictment. The proposed section would read:

Variance in Dates

It does not matter if the Indictment alleges that a specific transaction occurred on or about a certain date or month and the testimony indicates that in fact it was a different date or month. The law requires only a substantial similarity between the dates and months alleged in the Indictment and the dates and months established by the evidence.

The statute of limitations, however, provides an exception to his general rule. The Indictment alleges that the defendant agreed to, and did commit various crimes beginning as early as 2009 and continuing to as late as 2011; but, because of what is called the statute of limitations, the defendant may only be found guilty on a given charge if you find beyond a reasonable doubt that any conduct on his part (or, in the case of the conspiracy charges, the conduct on the part of any conspirator), that otherwise satisfies the essential elements of that charge occurred at least partly on or after September 24, 2010.

This proposed charge is adapted from the charges of the Honorable Paul A. Crotty in United States v. Tomasetta, S1 10 Cr. 1205 (PAC), and the Honorable Jed S. Rakoff in United States v. Treacy, S2 08 Cr. 366 (JSR).

In addition, if the defendant argues that he personally did not commit any act in furtherance of the charged conspiracies after September 21, 2010 even if others did – for instance, by suggesting that he signed the fraudulent documents earlier and that was the end of his involvement – the defendant will essentially be mounting a withdrawal defense. In that event, the Court should also instruct the jury as follows:

The defendant has raised the defense that he was not a member of the charged conspiracies because he withdrew from those conspiracies.

Once a person joins a conspiracy, that person remains a member until he withdraws from it. Any withdrawal must be complete and it must be done in good faith.

A person can withdraw from a conspiracy by taking some affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. In other words, the defendant must have demonstrated some type of positive action which disavowed or defeated the purpose of the conspiracy.

The defendant has the burden of proving that he withdrew from the conspiracy by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. In determining whether the defendant has proven that he withdrew from the conspiracy, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence regardless of who may have produced them. If the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. However, it is important to remember that the fact that the defendant has raised this defense does not relieve the government of its burden of proving the elements of the charged conspiracies. Those are things that the government must still prove beyond a reasonable doubt in order for you to convict the defendant of the charge conspiracies.

This proposed charge is adapted from Instruction 19-10 of Modern Federal Jury Instructions, Sand, Sieffert, Loughlin, Reiss, Allen, and Rakoff. See also United States v. Hamilton, 538 F.3d 162, 173 (2d Cir. 2008).

Finally, there is no reason to provide for the statute of limitations on a special verdict form as suggested by the defendant. The existence of a criminal act within the limitations period is a factual matter the jury will have to determine, as with all of the elements of the charged crimes and venue. It is not the practice of courts in this District to provide special verdict forms broken out by element, and there is no reason to do so for the statute of limitations. The defendant provides no authority to the contrary.

Respectfully submitted,

PREET BHARARA
United States Attorney

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cc: Counsel of record